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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 557

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO

No. 570

BURNS AND ROE, INC., ET AL., PETITIONERS

v.

LOCAL 825, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, AND NATIONAL LABOR RELATIONS BOARD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (A. 346–355) is reported at 410 F. 2d 5. The findings, conclusions, and order of the National Labor Relations Board (A. 3–40) are reported at 162 NLRB 1617.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1969, and the Board's timely petition for rehearing and suggestion for rehearing in banc was

denied on June 12, 1969 (A. 356–358, 359). The petition for a writ of certiorari in No. 557 was filed on September 4, 1969, and that in No. 570 on September 10, 1969. The petitions were granted on February 24, 1970 (A. 360, 361). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 24–25.

QUESTION PRESENTED

Whether a union violates Section 8(b)(4)(B) of the National Labor Relations Act by exerting coercive pressure upon a neutral employer that compels such employer either (1) to induce the primary employer to change his method of doing business or (2) to cease doing business entirely with the primary employer.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In September 1964, Burns and Roe, Inc. (Burns) began building a nuclear power generator plant at Oyster Creek, New Jersey, for the Jersey Central Power and Light Company. Burns subcontracted all the construction work to three companies—White Construction Company (White), Chicago Bridge and Iron Company (Chicago Bridge), and Poirier and McClane Corporation (Poirier) (A. 5, 17–18; 43–44, 55). All three subcontractors employed operating engineers who were members of respondent Local 825, Interna-

tional Union of Operating Engineers, AFL–CIO, which had collective bargaining contracts with Chicago Bridge and Poirier, but not with Burns or White (A. 5, 18; 45, 56–57, 70–71, 75–77, 80).

White's obligation under the subcontract was to construct the reactor building for the nuclear power plant. When White came on the job at the beginning of September 1965,[1] it assigned the work of starting and stopping an electric welding machine to employees who were members of the Ironworkers Union (A. 5, 18; 56–57, 58–59, 83–84, 228, 341–342). When the welding machine was installed at the end of the month, representatives of Local 825 demanded that a member of that union be given the job of pushing the buttons which started and stopped the machine, and requested White to sign an agreement giving Local 825 jurisdiction over all power equipment, including electric welding machines (A. 5–6, 19–20; 56, 57–59, 105). About the same time, Local 825 requested Burns to sign a similar contract (A. 6, 20; 44–45, 152–153). When both White and Burns refused to accede to these demands, the operating engineers employed by White, Chicago Bridge, and Poirier walked off the job (A. 5, 6, 20–21; 46–47, 59–60, 77–78).

On October 6, Burns formally submitted the work assignment dispute to the National Joint Board for the Settlement of Jurisdictional Disputes (A. 22; 48–49). The same day, Local 825 threatened the employers with another work stoppage unless the contracts were signed and the disputed work transferred to that union (A.

[1] All dates hereafter are in 1965.

8, n. 8, 21–23; 47–48, 77–78, 80–81). The employers again refused and another strike involving all of the operating engineers on the project ensued; it lasted from October 7 to 11 (A. 8, n. 8; 60–61, 78, 81).

On October 20, the Joint Board notified the parties that there was no reason to disturb the assignment of the disputed work to members of the Ironworkers Union (A. 23–24; 51, 339–340). However, representatives of Local 825 made it clear to all of the employers that it did not accept the decision of the Joint Board and would cause further trouble if the work assignment were not altered (A. 24; 83–86). On November 4, when the electric welding machine was started by an ironworker, White's engineers walked off their jobs, physically surrounded the machine, and prevented it from being operated (A. 24; 60–61, 68–69, 259). The next day, the same procedure was followed (A. 24; 61, 69). On November 8, the Board's Regional Director obtained a temporary injunction from the United States District Court under Section 10(l) of the Act, restraining Local 825 from using coercive means to force a cessation of business among the employers at the jobsite or to compel White to assign the disputed work to operating engineers (A. 24–25; 62, 343–345).

On November 17, White's engineers again walked off the job, this time ostensibly because of a dispute concerning the number of employees necessary to operate a recently installed electric pump. (A. 25; 63–66, 125–126, 138). However, in a discussion between representatives of Local 825 and White before the strike, the former admitted that this walkout "was more or less because of the electric welding machine being in opera-

tion" (A. 25–26; 66). The strike lasted until December 21 or 22 (A. 26; 66).

B. THE BOARD'S CONCLUSIONS AND ORDER

In the unfair labor practice proceeding against Local 825 which ensued, the Board found that that union had violated Section 8(b)(4)(D) of the Act by inducing and encouraging individuals employed by White, Chicago Bridge, and Poirier to strike, and by coercing these employers and Burns, for the purpose of forcing White to assign work on its electrical welding machine to engineers represented by Local 825 rather than to employees represented by the Ironworkers Union (A. 7). The Board further found that by applying such economic pressure on the neutral employers—Burns, Chicago Bridge, and Poirier—Local 825 also violated Section 8(b)(4)(B) of the Act, since an additional object of the pressure was to cause "a disruption of the business relationship among the various employers at the jobsite" (A. 7–9). The Board, following its earlier decision in *Local 3, International Brotherhood of Electrical Workers,* 140 NLRB 729, enforced, 325 F. 2d 561 (C.A. 2) (see *infra,* pp. 17–18), held that "an object such as [Local 825's] herein, although something less than a total cancellation of a business relationship, constitutes a 'cease doing business' object within the meaning of this section of the Act" (A. 8–9).[3]

[3] Member Fanning dissented from the Board's Section 8(b)(4)(B) finding on the ground that the finding that a jurisdictional dispute exists, within the meaning of Section 8(b)(4)(D), renders Section 8(b)(4)(B) inoperative (A. 7, n. 7). But see *infra,* pp. 21–22.

The Board ordered Local 825 to cease and desist from the unfair labor practices found and to post an appropriate notice (A. 10–14).

C. THE DECISION OF THE COURT OF APPEALS

On the Board's petition for enforcement, the court of appeals sustained the Board's finding that Local 825 had violated Section 8(b)(4)(D) of the Act,[3] but set aside its finding of a Section 8(b)(4)(B) violation (A. 346–355). Respecting the latter, the court agreed that the record "amply justifies the conclusion that [neutral employers] were subjected to coercion in the form of threats or walkouts, or both" (A. 351). The court stated, however, that Local 825 did not seek to compel a total cessation of business between the neutrals and White, but only to "'disrupt the business relation[ship]' between Burns and White so that the [former] would try to induce [White] to comply with [the Union's] demands" (A. 351). Following its earlier decision in *National Labor Relations Board* v. *Local 825, International Union of Operating Engineers*, 326 F. 2d 218, which involved a similar situation, the court held (A. 352):

> * * * * [P]roof of coercive activity amounting to "disruption of a business relationship" and aimed at causing a neutral employer to put pressure on the primary is insufficient, without more, to establish an effort to compel the one employer to "cease doing business" with the other. The lan-

[3] The court, however, modified the portion of the Board's order remedying that violation so as "to except from its prohibition coercive action aimed at enforcement of a Joint Board decision" (A. 354; see *infra*, pp. 21–22).

guage of section 8(b)(4)(B) is apt to prohibit the classical secondary boycott where the attempt is made to coerce the primary employer by compelling others to stop trading or dealing with him.

But we think the "cease doing business" language is not apt to cover the objective proved here, however objectionable or deserving of condemnation it may be * * *. We think it is for Congress to broaden the language of section 8(b)(4)(B) if it desires to cover such situations as this.

SUMMARY OF ARGUMENT

The Union's strike conduct, which sought to enroll neutral employers in a dispute not their own, was "secondary boycott" activity within reach of the objectives of Section 8(b)(4)(B). This Court has several times recognized, after extensive consideration of the applicable legislative history, that Congress' purpose in enacting this provision was to narrow the area of industrial conflict by shielding "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Bldg. Council,* 341 U.S. 675; *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board,* 386 U.S. 612, 626, 651. In this case the Union's only dispute was with White, for he was solely responsible for the work assignments regarding the welding machine. In striking Burns, Chicago Bridge, and Poirier, Local 825 was seeking to embroil them in a dispute which was not theirs, and as to which they were powerless themselves to grant any relief. Such conduct has all the hallmarks of that which led to the enactment of what is now Section 8(b)(4)(B).

The Union's strike conduct readily meets the requirement of that section that "an object" of the forbidden conduct be to force or require neutrals "to cease doing business" with the primary employer. It is firmly established that the "cease doing business" object need not be the only or even the predominant object of Union conduct to bring that conduct within the ban of Section 8(b)(4)(B). *Denver Bldg. Council, supra.* So long as the strike has no primary aspects, compare *National Woodwork Mfrs. Ass'n, supra,* it suffices that the cessation of business is one of the reasonably foreseeable consequences of a union's action. Undoubtedly it was so here, since, unless the neutrals were able to persuade White to change its job assignments, they could relieve themselves of the Union's pressure only by breaking off relations with White.

Moreover, as several courts of appeals have agreed, it is sufficient to meet the "cease doing business" aspect of Section 8(b)(4)(B) that a union seek to force the neutral employer to alter its existing method of doing business with the primary employer. In most situations where unions exert pressure on a neutral employer, they would be satisfied with a change in the operations of the primary employer, and would not in that case demand total cessation of business relations. True secondary conduct, such as was involved here, can readily be disguised behind such demands for change. Thus, to exclude such conduct from the reach of Section 8(b)(4)(B) would be substantially to nullify the broad prohibition on second-

ary conduct which was clearly Congress's purpose to enact.

Finally, Section 8(b)(4)(D) is not the exclusive remedy in this case. That section, which prohibits coercive action in jurisdictional disputes, was violated even by the Union's strike against the primary employer, White. The secondary aspects of coercive pressure employed against Burns, Chicago Bridge and Poirier had no relevance to Section 8(b)(4)(D); the latter evil is dealt with by subsection (B). To foreclose application of that subsection here would permit the application of such secondary pressure whenever a strike against the primary employer would not violate subsection (D)—for example if a union's right to the work in question had previously been established.

ARGUMENT

I. THE UNION'S STRIKE CONDUCT, WHICH SOUGHT TO EMBROIL NEUTRAL EMPLOYERS IN A DISPUTE NOT THEIR OWN, WAS "SECONDARY BOYCOTT" ACTIVITY WITHIN REACH OF THE OBJECTIVES OF SECTION 8(b)(4)(B)

Section 8(b)(4)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to exert coercive pressure on a neutral or secondary employer where "an object thereof is" forcing or requiring him "to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person".[4] As this

[4] Prior to the 1959 amendments to the Act, this provision appeared as Section 8(b)(4)(A) of the Labor Management Relations Act, 1947.

Court has recognized, Congress' objective in enacting this provision was to narrow the area of industrial conflict by shielding "unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building Council*, 341 US 675, 692.

As reported by the Senate Labor Committee, Section 8(b)(4) barred strike pressure

> (1) for the purpose of forcing or requiring any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * * [S. 1126, as reported, 80th Cong., 1st Sess., 15, 1 Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948) 113.]

Senator Taft, one of the sponsors of the Senate Bill, described this provision as making "it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." 93 Cong. Rec., 4198, 2 Leg. Hist. (1947) 1106. Senators Thomas, Murray, and Pepper, in a minority report, criticized the Senate Bill because it "ignores valid distinctions between justified and unjustified boycotts based on the objective of the union in carrying on such a boycott and the relationship of the boycotted employer to the disputing employer." S. Min. Rep. No. 105, Pt. 2, 80th Cong., 1st Sess., 20, 1 Leg. Hist. (1947) 482. They pressed this

point in the floor debates. See 93 Cong. Rec. 4035, 4197–4199, 4369, 4767, 4844–4845, 2 Leg. Hist. (1947) 1047–1048, 1104–1109, 1179–1180, 1341, 1366–1368.

In response to this criticism, Senator Taft acknowledged that his bill was in fact aimed at prohibiting all secondary boycotts; he stated (93 Cong. Rec. 4198, 2 Leg. Hist. (1947) 1106):

> * * * under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

Senator Taft's secondary boycott proposal was ultimately enacted into law, with the following significant addition:

> Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is." Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities simply because one of the purposes of such strikes

might have been lawful. * * * [93 Cong. Rec. 6859, 2 Leg. Hist. (1947) 1623, Supplementary Analysis by Senator Taft.][5]

Thus, Congress' objective was broad, to make it "unlawful to resort to a secondary boycott" (*supra*, p. 10).[6] This Court recognized the breadth of that

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[5] Senator Murray objected to this broadening of Section 8(b)(4)(A); in his view, the proper approach would have been to "look to the primary objective of the strike rather than to all its objectives." 93 Cong. Rec. 6498, 2 Leg. Hist. (1947) 1569-1570.

[6] In 1959, Congress manifested an intent to broaden the ban against secondary boycott activity further by plugging certain "loopholes" in Section 8(b)(4)(A) (which became Section 8(b)(4)(B)), and by adding Section 8(e) which barred so-called "hot cargo" agreements. See *National Labor Relations Board* v. *Servette*, 377 U.S. 46, 51–54; *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612, 633–634. In regard to defining the proscribed secondary object, the language of Section 8(e) (*infra*, p. 25) "closely tracks that of [the original] § 8(b)(4)(A)." *National Woodwork Mfrs. Ass'n*, *supra*, at 635. Section 8(e), as originally introduced, did not contain the phrase "cease doing business"; it was added on the floor of the Senate as a "general catchall" phrase whose purpose was to broaden the section's coverage. 105 Cong. Rec. 6556–6557, 2 Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O., 1959) 1162. See also *National Labor Relations Board* v. *Joint Council of Teamsters No. 38*, 338 F. 2d 23, 27 (C.A. 9): "the second prohibitory clause of section 8(e) [cease doing business] was added for the sole purpose of avoiding a possible subject-matter limitation upon the agreements prohibited."

Section 8(e) has been interpreted as proscribing not only "hot cargo" clauses which explicitly require the contracting employer to cease doing business with persons disfavored by the union, but also more subtle language which would, as a practical matter, have the same result. See, *e.g.*, *National Labor Relations Board* v. *Amalgamated Lithographers of America (Ind.)*, 309 F. 2d 31, 35–36, 41–42 (C.A. 9), certiorari denied, 372 U.S. 943;

objective when it most recently confronted the issue, *National Woodwork Mfgrs. Ass'n* v. *National Labor Relations Board,* 386 U.S. 612. While the Court divided 5–4 over the issue whether the particular conduct there involved was primary or secondary in nature, there was unanimous agreement, on a careful review of the legislative history, that the purpose of the enactment was "to protect the employer * * * from union pressures designed to involve him in disputes not his own." *Id.* at 625–626; see also 651. "The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board,* 181 F.2d 34, 37 (C.A. 2), affirmed, 341 U.S. 694.

The conduct in this case readily fits this description. The Union's only dispute was with White, which was solely responsible for the work assignments regarding the welding machine. Burns, Chicago Bridge and Poirier were neutral employers. In striking them, Local 825 was seeking to embroil them in a dispute not their own. As in any secondary boycott, the neutrals were themselves powerless to grant the Union's ultimate demand; they could only transmit the pressure which had been applied to them by coercing White in its business relations with them, as a means

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Los Angeles Mailers Union No. 9 v. *National Labor Relations Board,* 311 F. 2d 121, 124–125 (C.A. D.C.); *Truck Drivers Union Local No. 413* v. *National Labor Relations Board,* 334 F. 2d 539, 546–547 (C.A. D.C.), certiorari denied, 379 U.S. 916.

of bringing it around. Such conduct has all the hallmarks of that which led to the enactment of what is now Section 8(b)(4)(B).

II. THE UNION'S STRIKE CONDUCT, WHICH SOUGHT TO FORCE NEUTRAL EMPLOYERS TO COERCE WHITE IN ITS HANDLING OF A LABOR DISPUTE LIMITED TO ITSELF, HAD AS "AN OBJECT" FORCING OR REQUIRING THE NEUTRALS "TO CEASE DOING BUSINESS WITH" WHITE WITHIN THE MEANING OF SECTION 8(b)(4)(B)

The crucial issue in the court of appeals was not the purpose of Section 8(b)(4)(B), which plainly includes the conduct here, but the section's language. The court of appeals believed that that language could not be given a construction which included within its ban the conduct in this case. It held that, since Local 825's expressed, immediate objective was not to compel a total cessation of business dealings between the neutrals and White, but only to compel White to change its work assignment regarding the welding machine, there was no object to force the neutrals to "cease doing business" with White. Of coure, if Local 825's conduct does not come within that language, no unfair labor practice can be found even though the purpose of the section may thereby be thwarted. 29 U.S.C. 163; *Local 1976, United Brotherhood of Carpenters and Joiners* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, 98; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665. But, as we now show, the court of appeals erred. The language of Section 8(b)(4)(B) can be

interpreted comfortably to include the conduct in this case. Given the evident application of the purpose of the section, the language should be so interpreted.

A. "AN OBJECT"

Section 8(b)(4)(B) proscribes pressure on a neutral employer where "*an* object" thereof is to force or require him to "cease doing business" with the primary employer (or some other person). The language of the provision does not require that a cessation of business relations be the union's immediate objective; it is sufficient that it be "an object." *Denver Building Council, supra,* 341 U.S. at 689. Nor does the language require that a cessation of business dealings between the neutral and the primary employers be specifically intended, where that is a reasonably foreseeable consequence of the union's action. It has been recognized in other connections under the Act that "specific evidence of [a] subjective intent is 'not an indispensable element of proof of violation' * * *. 'Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. * * *' " *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 227. See also *Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 45. So with Section 8(b)(4)(B), a union may be deemed to have, at least as one of its objectives, a purpose to force a cessation of business relations where such is a reasonably foreseeable consequence of its action.

In *Denver Building Council, supra,* this Court applied that principle in sustaining the Board's finding that a strike of the unionized employees working on a construction project to protest the presence of a non-union subcontractor (Gould & Preisner) was for such an object, notwithstanding the union's contention that its only purpose was to force the general contractor (Doose & Lintner) to make the project an all-union job. As the Court explained: "The non-union employees were employees of Gould & Preisner. The only way that respondents could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the Council's strike, in order to obtain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract." 341 U.S. at 688.

The same principle applies here. It does not appear that Local 825 explicitly demanded that neutral employer Burns break off business relations with White, and that the other neutrals break off relations with Burns, if White refused to use members of Local 825 on the welding machine. But this was the only alternative the neutrals had if White continued to refuse the Union's demand. Accordingly, although Local 825 may not have specifically intended to cause a total disruption of business relations, this was nonetheless a reasonably foreseeable consequence of its pressure on the neutral employers.

B. "CEASE DOING BUSINESS"

The court of appeals concluded that *total* severance by the neutral of its business connections with the primary employer must be a union object. As we have just shown, such a purpose may in fact be ascribed to the Union in this case as an alternative to its stated goal of securing a change in working conditions. But in any event, we believe it is sufficient to satisfy the "cease doing business" aspect of Section 8(b)(4)(B) that the union seek to force the neutral to alter its existing method of doing business with the primary employer.[7]

At the very least, Local 825 intended by its pressure to require Burns to superimpose on its existing agreement with White an added condition of performance—that the work on the welding machine had to be done by members of Local 825. Acceptance of this condition by Burns would have required it to cease doing business with White on the basis of their original arrangement. As the Board stated in analogous circumstances:

> While it does not appear that Respondent [union] explicitly demanded that the Company cancel the Delee contract if Delee refused to use its members, this was the only alternative

[7] It is well to reiterate that this is not a case where the employer being pressured is not in fact a neutral, because it has some direct authority over the matter in dispute. Unlike the situation in *National Woodwork Mfgrs. Ass'n*, *supra*, there is no primary aspect to this dispute so far as Burns, Chicago Bridge and Poirier are concerned.

> the Company had if Delee continued to refuse replacement of its employees by members of Respondent. * * * [Moreover,] [e]ven assuming, *arguendo,* that Respondent did not consciously contemplate imposition of this sanction, it is nonetheless clear that Respondent sought by its threat to require that the Company superimpose upon its existing agreement with Delee an added condition of performance, that the work had to be done by Respondent's members. Acceptance of this condition by Delee would require the Company to cease doing business with Delee on the basis of their original arrangement. * * * [*Local 3, International Brotherhood of Electrical Workers,* 140 NLRB 729, 730, enforced, 325 F. 2d 561 (C.A. 2).]

An avowed effort to force a neutral to impose new working conditions on a primary employer, no less than an effort to force the neutral to sever all business connections, is exerted "for its effect elsewhere" (*National Woodwork Mfgrs. Ass'n, supra,* 386 U.S. at 632) and thus embroils the neutral in a dispute not his own. To exclude such conduct from the reach of Section 8(b)(4)(B) would substantially nullify the broad prohibition on secondary conduct which the legislative history shows Congress to have intended. For in many situations where the union exerts pressure on a neutral employer, its major aim is not to force a total cessation of business relations between the neutral and the primary employer, but to force the neutral to induce the primary employer

to change its operations as the union wishes. Only if the neutral employer cannot induce the primary employer to make the change demanded by the union, would he be faced with the necessity of having entirely to cease doing business with the primary employer.

Thus, where, as in *Denver Bldg. Council, supra,* the union brings pressure on the general contractor because it has engaged a nonunion subcontractor, the union would ordinarily be satisfied if the general contractor succeeded in getting the subcontractor to sign a contract with the union; only if the general contractor were unable to achieve this result would the union require that the subcontractor actually be removed from the job. Accordingly, by confining Section 8(b)(4)(B) to situations where the union's immediate objective is a total cancellation of the business relation between the neutral and the primary employer, the court below has immunized a large area of secondary coercion from the reach of Section 8(b)(4)(B). Moreover, it has provided an easy means of evading the sanctions of that provision; in most cases, a union could readily couch its demands in terms of what it desired from the primary employer rather than as a flat direction to the neutral employer to cease doing business with him.

Accordingly, and contrary to the court below, other courts of appeals have interpreted Section 8(b)(4)(B) as reaching the type of conduct here. In *Na-*

tional Labor Relations Board v. *Carpenters District Council of New Orleans,* 407 F. 2d 804 (C.A. 5), for example, the union had exerted coercive pressure upon the general contractor (a neutral employer) in furtherance of its effort to force the subcontractor (the primary employer) to rehire six of its members who had been replaced by members of another union. The union defended on the ground that, since it "never suggested to [the neutral] that it should cease doing business with [the primary] and had no desire for this to happen," Section 8(b)(4)(B) did not apply. 407 F. 2d at 806. The Fifth Circuit rejected this contention, stating that "the objective of causing a serious disruption of an existing business relationship, even though something less than a total cancellation of the business connection, is within the intendment of the statute." *Ibid.* See also *National Labor Relations Board* v. *Local 3, International Brotherhood of Electrical Workers,* 325 F. 2d 561 (C.A. 2), enforcing 140 NLRB 729; *National Labor Relations Board* v. *Milk Wagon Drivers' Union, Local 753,* 335 F. 2d 326, 328–329 (C.A. 7); *New York Mailers' Union No. 6* v. *National Labor Relations Board,* 316 F. 2d 371 (C.A. D.C.), enforcing, 136 NLRB 196, 197–198; *Alpert* v. *Local 1066, International Longshoremen's Ass'n,* 166 F. Supp. 22, 25 (D. Mass.); but cf. *Retail Clerks Union Local 770* v. *National Labor Relations Board,* 296 F. 2d 368 (C.A. D.C.).

III. SECTION 8(b)(4)(D) IS NOT AN EXCLUSIVE REMEDY FOR SECONDARY PRESSURE AIMED AT EMBROILING A NEUTRAL IN A JURISDICTIONAL DISPUTE OVER THE WORK ASSIGNMENTS MADE BY THE PRIMARY EMPLOYER

The contention may be made that Section 8(b)(4)(D) provides the exclusive remedy for the conduct alleged in this case. That section bars strikes and other coercive pressure against "any person" for an object of "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than employees in another labor organization or in another trade, craft, or class."

That section applies to the conduct in this case; however, as the Board and the court of appeals agreed, it applies primarily to the strike against White itself. Even had there been no pressure against the neutrals in this case, Section 8(b)(4)(D) would have been violated. Although in that case, too, Congress' purpose was to protect an employer from being trapped in the center of a controversy in which he played no role, *National Woodwork Mfgrs. Ass'n, supra,* 386 U.S. at 625, the involvement of outside employers is not a necessary element of the Section 8(b)(4)(D) offense; it is not part of the basic evil which Congress was trying to reach with that section. The involvement of outside, neutral employers is dealt with directly by Section 8(b)(4)(B). In cases like this one, where both evils are present, there is no obstacle to application of both statutory sections.

There are other reasons why Section 8(b)(4)(B) should also apply. The charge filed may allege only that the conduct violates Section 8(b)(4)(B). See *National Labor Relations Board* v. *Carpenters District Council of New Orleans, supra.* If the union's right to the work in question were established by the Board in a proceeding under Section 10(k) or by a tribunal agreed upon by the parties, such as the Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry, coercive pressure to enforce that award against the primary employer would not violate Section 8(b)(4)(D).[8] But it does not follow that the union may extend that coercive pressure to neutral employers. Indeed, the congressional purpose was to avoid involving the neutrals in such a dispute. Such an involvement can be prevented only by reaching it under Section 8(b)(4)(B). See *Local No. 5, United Ass'n of Journeymen* v. *National Labor Relations Board,* 321 F. 2d 366, 371 (C.A. D.C.), certiorari denied, 375 U.S. 921.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed insofar as it denies enforcement of the Section 8(b)(4)(B) portion of the

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[8] Section 8(b)(4)(D) contains an express exception for situations where the "employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work * * *." The court below expressly incorporated this exception in the portion of the Board's order relating to the 8(b)(4)(D) violation (see n. 3, *supra*).

Board's order, and the case should be remanded to that court with directions to enforce that portion of the order.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; strike or primary picketing;

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular

trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *

* * * * *

8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: * * *.

* * * * *

Sec. 10(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

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